Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1327

THE BOEING COMPANY

(formerly The Boeing Airplane Company), *et al.*,
Petitioners,

v.

WILLIAM R. VAN GEMERT, *et al.*,
Respondents.

Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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No.

THE BOEING COMPANY (formerly The Boeing Airplane Company), *et al.*,

Petitioners,

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WILLIAM R. VAN GEMERT, *et al.*,

Respondents.

Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

Respondents pray that the request by petitioners that a writ of certiorari issue to review the judgment entered on December 21, 1978, by the United States Court of Appeals for the Second Circuit, sitting *en banc*, reversing the decision of a panel of that court, and affirming a judgment and orders of the United States District Court for the Southern District of New York which are in accord and consistent with this court's decision in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U. S. 420 (1975), and the "American rule" there enunciated, be denied.

The *en banc* Court of Appeals held that the judgment award against Boeing constituted a common fund within

the meaning of *Alyeska, supra,* in which every class member had a vested interest, and that every class member had benefited. Therefore, it held that attorneys fees could properly be awarded from the fund as a whole.

Question Presented

Does the creation of a fund by judgment after trial and appellate review in a class action litigation confer a benefit sufficient to justify an award of attorneys fees to the attorneys for the successful class, from the fund, which award would take into consideration the entire judgment fund?

Statement of the Case

The Court of Appeals in reversing the trial court (Van Gemert I, 53a-82a) held that Boeing had failed to provide reasonable notice, as required by the New York law of contracts, of the redemption of its convertible debentures.

On appeal from the judgment awarding damages without interest, only one of the three firms of attorneys appointed by the District Court as Plaintiffs Committee of Attorneys, acting for itself, raised the question of dividing unclaimed portions of the judgment award among claiming members of the class (51a).

The judgment entered by the District Court (39a-42a) on remand from Van Gemert II (553 Fed. 2d 812, 1977) (45a-52a) did not hold "that even though claiming class members could not directly invade the sums remaining unclaimed in order to pay their attorneys fees, * * * these funds could be used on a pro rata basis to pay the attorneys' fees of the class" (5).* This judgment together with Judge Ryan's order of September 22, 1977, denying petitioners' motion to amend the judgment (43a-44a), upon which petitioners' application for a writ of certiorari is ultimately based, provides that the plaintiff class shall recover as their damages from the defendants the principal sum of $3,289,359 with interest from March 9, 1966, to the date of the judgment—June 30, 1977, and that "members of the plaintiffs Committee of Attorneys be awarded their fees, expenses and disbursements as fixed by the Court to be paid out of said total amount of this judgment" (40a).

*Page numbers in parentheses refer to petitioners' brief.

It is not disputed that after payment of attorneys fees, expenses and disbursements, and claiming class members aliquot shares, the judgment fund remaining does not belong to the class members who received their shares* (Van Gemert II, *supra,* 51a).

In Van Gemert III (27a-37a) (573 Fed. 2d 733), the decision of the panel of the Court of Appeals which was reversed by that Court sitting *en banc* (1a-17a), the panel held: "We hold that until absent class members receive the benefit of the attorneys' labors by claiming their portions of the award, no such charge or assessment [attorney's fee] may be paid from their undistributed shares" (29a). In effect, the panel held that the benefits attained by plaintiffs' attorneys had to be claimed by the individual class member before an appropriate award for attorneys' fees and expenses could be made and then prorated against each share claimed only.

*Respondent believes any unclaimed portions should escheat to New York State under §1200, N. Y. S. Abandoned Property Law.

The Court of Appeals *en banc* reversed the panel deciding Van Gemert III, and affirmed the District Court's judgment and order and the order denying petitioners' motion to amend the judgment, and held by a 6-3 vote that in accord with the "American rule" (17a) the judgment against Boeing constituted a common fund within the meaning of *Alyeska, supra* (9a), and that the "fees of the attorneys for the class will be deducted from the amount for which Boeing had already been held liable" (17a)—including that part of the class action judgment award which is unclaimed (3a).*

The Court of Appeals *en banc* stated that its "conclusion is predicated on considerations of equity and sound policy and is sustained as well by longstanding precedent" (3a). The opinion of Chief Judge Kaufman, writing for the majority (1a-17a) sets forth the bases from which this conclusion was reached.

Reasons for Denying the Writ

This is not an appropriate case for review on certiorari since none of the considerations governing review on certiorari are present. The Court of Appeals in its 6-3 *en banc* decision for which certiorari is sought did not overrule the Supreme Court decision in *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U. S. 240 (1975), but followed it. *Alyeska, supra,* in holding that attorneys fees were not permitted to be charged against "losing" parties in "private attorney general" type cases as one of the exceptions to the "American rule" that "the

*The Court of Appeals *en banc* held that Van Gemert II had not reached the issue presented in this appeal in its decision, and that therefor the law of the case doctrine did not apply. It went on to say that even if it did apply, the *en banc* court would not be bound (6a-7a, fn. 9).

prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser" (*Alyeska, supra,* at p. 247), stated as a recognized exception to that rule what has come to be called the common fund doctrine —that a "party preserving or recovering a fund for the benefit of others * * * [may recover] attorneys fees, from the fund * * *" (*Alyeska, supra,* at p. 257). The *en banc* Court of Appeals decision is in total accord and consistent with this holding. Its decision applies to a class action which is tried and won by plaintiffs on the merits, the same standards followed without exception by the courts in administering class actions which are terminated by settlement with the defendants disclaiming all liability.

POINT I

The decision of the *en banc* Court of Appeals is in accord and consistent with this Court's decision in *Alyeska Pipeline Service Co. v. Wilderness Society*

Petitioners' application for review is not based on an *en banc* decision contrary to a decision of this Court—as petitioners claim in Point I of their petition. It is based on an *en banc* decision which follows a long line of Supreme Court decisions commencing with *Trustees v. Greenough* (105 U. S. 527) in 1882, and followed thereafter, *inter alia,* in *Central Railroad & Banking Co. v. Pettus,* 113 U. S. 116 (1885); *Sprague v. Ticonic National Bank,* 307 U. S. 161 (1939); *Mills v. Electric Auto-Lite Co.,* 396 U. S. 375 (1970); *Hall v. Cole,* 412 U. S. 1 (1973); *Rich v. U. S., Industrial Lbr. Co. Inc.,* 417 U. S. 116 (1974), and *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U. S. 240 (1975), which hold, as applicable herein and as stated by the *en banc* Court below "* * *

historically, the federal courts have exercised an equitable power to allow attorneys' fees and costs to be charged against a fund created, increased, or protected by successful litigation" (8a).

In *Alyeska,* certiorari was granted by this Court (419 U. S. 283) (1974) to determine whether an award of attorneys' fees by the Court of Appeals for the District of Columbia Circuit to respondents against petitioner based upon the Court's equitable powers and the theory that respondents were entitled to fees because they were performing the services of a "private attorney general," was appropriate. On this point this Court reversed (421 U. S. 240) (1974). This decision is totally inapplicable to the case at bar, as the *en banc* decision of the Court of Appeals for the Second Circuit in Van Gemert (1a-17a) was not based upon, nor did it even consider, the question of attorneys' fees for "private attorney generals" but rather was based solely on what has come to be known as the common fund rule. Indeed the Supreme Court itself in the majority opinion of Mr. Justice White in *Alyeska, supra,* defined the limits of that decision when, after re-affirming the general rule that "• • • absent statute or enforceable contracts, litigants pay their own attorneys fees. • • •" and after referring to the two exceptions to such general rule, to-wit: (1) "• • • the historic power of equity to permit the trustee of a fund or property, or a party preserving or recovering a fund for the benefit of others in addition to himself, to recover his costs, including his attorneys' fees, from the fund or property itself or directly from the other parties enjoying the benefit. • • •" and (2) the power of a court to "• • • assess attorneys' fees for the 'wilful disobedience of a court order' • • • or when the losing party has 'acted in bad faith' • • •" (pp. 257-259), it stated:

> "• • • These exceptions are unquestionable assertions of inherent power in the courts to allow attorneys' fees in particular situations, unless forbidden by Congress, but none of the exceptions is involved here. The Court of Appeals expressly disclaimed reliance on any of them" (pp. 259-260).

Petitioners' entire efforts in this Court, as well as before the *en banc* court below, have been based on one premise alone—that regardless of the fund created, the vesting of rights, and the judgment entered after trial and appeal, the only persons benefiting in a class action are those who file claims pursuant to the judgment prior to the award by the court of attorneys' fees, and that therefore such fees should be based on the dollar amount so claimed and not the entire judgment amount (ignoring for argumentative purposes, all the other considerations which are used by a court in determining fees in successful class actions). In support of this proposition, petitioners have attempted to distinguish opinions by this Court where such a proposition was not even considered, let alone decided, such as *Trustees, supra; Pettus, supra; Sprague, supra,* and *Alyeska, supra,* but which are authority for the presently prevailing rule of awarding attorneys' fees and costs to a party succeeding in preserving or creating a fund for others to be paid from the fund. Petitioners accept this Rule—since they at least agree that atttorneys' fees are properly chargeable against that part of the judgment to which claims are filed by class members. They seek, however, to divide the judgment into two parts—one which vests, and one which does not vest. For this startling theory, they offer no

law or judicial precedent, other than their own definition of the meaning of "benefit" (11); nor do they succeed in demonstrating any error in the *en banc* court opinion, which, it is submitted, is in full accord with the cases in this Court from *Trustees v. Greenough, supra,* through *Alyeska, supra.*

The plaintiffs in the case at bar were certified as a Rule 23(b)(1) Federal Rules of Civil Procedure class, irrevocably binding all class members (with no right to opt out), present or not and filing proofs of claims or not. *Mungin v. Florida E. C. R. Co.,* 1970, D. C. Fla., 318 Fed. Supp. 720, aff'd C. A. 5, 441 F. 2d 728, cert. den. 404 U. S. 897; *Green v. Wolf Corp.,* 1968, C. A. 2, 406 F. 2d 291, cert. den. 395 U. S. 977. The judgment that was entered was in favor of all members of the plaintiff class (39a-42a). It was not limited to any portion of such class, nor did it require affirmative action on the part of the class member for the rights and disabilities of such a judgment to attach—the right to claim an aliquot share of such judgment, and the disability of being forever barred from instituting another such action. (Certainly petitioners would claim the judgment in this case as a bar against another suit started in the future by a non-claiming class member.) This was clearly recognized by the *en banc* court:

> "• • • If a plaintiff class-member is adjudicated to have an interest in a fund, he has benefited within the meaning of the common fund doctrine (11a).
>
> "The rationale for such a rule is evident, as the case before us indicates. A portion of the judgment won by plaintiffs' attorneys—at least $213 for each unconverted debenture—is due every member of the class. Each plaintiff has a present vested interest in the class recovery, and his share of the judgment may be received on request. It cannot be urged convincingly, then, that the absent plaintiffs have not received a benefit from the litigation" (12a).

Even if a class member had had a right to "opt-out," as under Rule 23(b)(3) F.R.C.P., and failed to exercise it—which is the situation presented to the District Court, Oregon, in a motion concerning attorneys' fees pending in the case mentioned by petitioners at page 8 of their petition, *American Timber & Trading Co. v. First National Bank*—it still would not release him from being bound by the final judgment in the case. This too, the *en banc* court considered and dealt with (11a-12a, n. 14).

Petitioners state (11) that this Court in *Alyeska, supra,* expressly limited *Sprague, supra,* insofar as *"Sprague* suggests a view of the common benefit exception which is broad enough to justify imposing attorneys' fees on the property of a loser or other non-fiduciary of the litigation." This sentence alone illustrates the error in petitioners' reasoning. Respondents have not sought to impose "attorneys' fees on the property of a loser or other non-fiduciary of the litigation." The common fund doctrine as set forth in *Trustees v. Greenough, Sprague v. Ticonic Bank* and *Alyeska, supra,* and the *en banc* court in the case at bar (1a-17a) is that attorneys' fees are paid from the fund recovered through the efforts of plaintiffs' attorneys. Once the fund is recovered it no longer is the property of the "loser." In the case at bar the "loser," Boeing, had a judgment entered against it after trial and appeal. It paid the judgment. No further funds are sought from Boeing—not for costs, not for attorney's fees, not for anything. Attorneys' fees and costs are sought from the judgment award created by respondents' attorneys, which now belongs to the

class. As the *en banc* court below itself stated: "Under today's decision, however, the fees of the attorneys for the class will be deducted from the amount for which Boeing has *already* been held liable. There is no "surcharge" on the defeated litigant" (17a) (Court's italics). Thus, petitioners' usage of "the American Rule" as stated in *Alyeska,* as a basis for persuading this Court to issue a writ of certiorari because of the decision of the *en banc* court below allegedly in conflict therewith, is not in accord with the facts of this case, the decision below, or the law in this country.

POINT II

The decision of the *en banc* Court of Appeals is in accord with judicial standards for awarding fees to attorneys in class actions

The standards followed by the federal courts today in determining fees to attorneys in successful (settlement or judgment on the merits after trial) class action litigations are basically those set forth by the Court of Appeals in the 2nd and 3rd Circuits--*City of Detroit v. Grinnell Corp.,* 495 Fed. 2d 448 (2nd Cir. 1974), and *Lindy Brothers Builders, Inc. v. American Radiator and Standard Sanitary Corp.,* 487 Fed. 2d 161 (3rd Cir. 1973). One of the several criteria there set forth is the amount of the fund recovered. All of these criteria are then considered by the District Court in awarding attorneys fees. Absent an abuse of discretion, judicial supervision of the fee award at the District Court level—which would take into account all the factors present in any one case by a judge familiar with the case—is the only viable solution to the determination of a proper, fair and equitable fee award. Thus, questions concerning time spent, hourly charges, complexity of the litigation, the fund realized, the number of claims presented, set-

tlement or judgment on the merits after trial, *et al.,* would be decided at the trial level within the context of the litigation itself.

Petitioners argument in Point II of the petition is irrelevant to a situation such as the one at bar, since it ignores the fact that a judgment has been entered in favor of the class on whose behalf suit was brought, as an entity (39a-42a).

Petitioner also is intermingling its argument concerning the ultimate disposition of unclaimed portions of the judgment award with its argument concerning one of the bases of attorneys fees, in its Rule 23 FRCP argument in Point II of its petition. The entire judgment award is the fund from which attorneys fees as fixed by the court, is paid, so that thereafter each class member will receive a proportionate share. But the filing of a claim by a class member does not affect the size of the award to him—it is fixed, whether he files or not. Petitioners admit that "Expenses of instituting an action and notifying the class * * *" (13, fn.) are properly payable from the entire judgment award itself. Since this does not make the "loser" bear extra expense contrary to petitioners' use of the "American Rule" here, neither does or should attorneys fees. Even without going into the question of the ultimate disposition of the fund remaining—which has been enunciated but specifically not decided (14a, fn. 17)—there can be no question as to the rights of a class member to avail himself of receiving his proportionate share of the judgment award even after attorneys fees are fixed and paid. If such fees were limited to claims filed at the time fees were awarded, then the later "claimant" would receive more than an earlier claimant. On the other hand, fees based on the entire judgment, would leave an equal (proportionately)

amount for each claim, present or future. Thus fees paid on the entire judgment award are proportionate to the benefits of the case.

Petitioners argument that awarding attorneys fees based (as one of the many criteria for an award) on the entire judgment award in a litigation terminated by judgment on the merits after trial and appellate review, will make "more difficult the settlement of class actions" (14) with their reasons thereafter, reduces itself to a statement that experienced attorneys after settling a case, will require or demand fees based not on the settlement amount, but rather on the *ad damnum* clause of the complaint. This just is not so. In any case, as stated above, judicial supervision of fee awards certainly prevents any inequities.

CONCLUSION

For the reasons set forth above, respondents pray that the petitioners' application that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit sitting *en banc*, be denied

Dated: March 23, 1979.

Respectfully submitted,

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